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## Cerclaing the Issues: Making Sense of Contractual Liability Under CERCLA

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# Comments

## "CERCLAING" THE ISSUES: MAKING SENSE OF CONTRACTUAL LIABILITY UNDER CERCLA

### TABLE OF CONTENTS

I. INTRODUCTION .....	348
II. BACKGROUND .....	349
A. Common Law Remedies to Hazardous Waste ....	349
B. Congressional Remedies to Hazardous Waste ....	350
1. <i>Liability Under CERCLA</i> .....	354
2. <i>Defenses to CERCLA Liability</i> .....	354
C. The Confusion Regarding Contractual Releases of Environmental Liability .....	355
III. THE APPLICABLE LAW .....	358
A. Analytical Application of <i>United States v. Kimbell         Foods, Inc.</i> .....	361
1. <i>The United States v. Chem-Dyne Corp. Analy-             sis: Federal Rules of Decision Provide Content for             CERCLA</i> .....	362
2. <i>The Mobay Corp. v. Allied-Signal, Inc. Analy-             sis: Federal Rules of Decision Provide Content for             CERCLA</i> .....	363
3. <i>The Mardan Corp. v. C.G.C. Music, Ltd.             Analysis: State Common Law Provides Content for             CERCLA</i> .....	000
B. Analysis of <i>Chem-Dyne, Mobay, and Mardan</i> .....	365
IV. INTERPRETATION OF THE CONTRACTUAL RELEASE .....	366
A. Two Interpretations of CERCLA Section 107(e)(1) .....	367
1. <i>Upholding Contractual Releases Between Private             Parties: Mardan Corp v. C.G.C. Music, Ltd. ...</i>	369
a. <i>Recent cases applying the Mardan analysis</i> .....	370
2. <i>Upholding Contractual Releases Between a PRP and             a Party That Would Not Otherwise Be Liable Under             CERCLA: AM International v. International             Forging Equipment</i> .....	372

B. Analysis of the Two Interpretations of CERCLA Section 107(e)(1) .....	375
V. MAKING SENSE OF CONTRACTUAL RELEASES AND CERCLA LIABILITY .....	376
A. Uniform Federal Rules of Decision Should Be Incorporated to Provide Content for CERCLA ...	376
B. Contractual Releases of CERCLA Liability Should Be Upheld Where the Release Includes an Express Release of CERCLA Liability .....	377
C. Courts Should Interpret Section 107(e)(1) as Validating Contractual Releases Only Between Private Parties .....	378
1. <i>The Mardan Corp. v. C.G.C. Music, Ltd.</i> <i>Analysis</i> .....	378
2. <i>The AM International v. International Forging</i> <i>Corp. Analysis</i> .....	379
VI. CONCLUSION .....	381

## I. INTRODUCTION

“[S]tate investigators discovered large trenches and pits filled with freeflowing, multi-colored, pungent liquid wastes. . . . Thousands of dented and corroded drums containing a veritable potpourri of toxic fluids were discovered . . . . Many were found intact but many had ruptured spilling chemicals into the soil.”<sup>1</sup>

Hazardous waste<sup>2</sup> has been dumped for decades.<sup>3</sup> Only relatively recently, Congress enacted legislation to combat hazardous waste pollution.<sup>4</sup> Among such legislation is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>5</sup> CERCLA liability is broad<sup>6</sup> and the statutory defenses are narrow.<sup>7</sup> Therefore, potentially responsible parties

1. O'Neill v. Picillo, 682 F. Supp. 706, 709, 725 (D.R.I. 1988).

2. Although CERCLA uses the term “hazardous substances” only, this Comment uses “hazardous waste” and “hazardous substances” interchangeably.

3. *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1459, 1462 (1986) [hereinafter *Toxic Waste Litigation*].

4. *Id.* at 1469.

5. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 101, 42 U.S.C. § 9601 (1982) [hereinafter CERCLA].

6. *Toxic Waste Litigation*, *supra* note 3, at 1513. For a discussion of CERCLA liability, see *infra* notes 61-65 and accompanying text.

7. For a discussion of defenses to CERCLA liability, see *infra* notes 66-71 and accompanying text.

(PRPs)<sup>8</sup> have attempted to distribute such liability through contractual releases<sup>9</sup> of environmental liabilities.<sup>10</sup>

This Comment will focus on contractual releases of CERCLA liability. In particular, this Comment will discuss two threshold issues: the applicable law<sup>11</sup> and the validity of contractual releases.<sup>12</sup> Finally, this Comment will discuss the two prevailing interpretations of section 107(e)(1) which regulates the contractual release of CERCLA liability.<sup>13</sup>

## II. BACKGROUND

### A. Common Law Remedies to Hazardous Waste

Before the promulgation of CERCLA and other statutes regulating hazardous waste,<sup>14</sup> the only remedies available to parties exposed to hazardous waste were common law tort actions.<sup>15</sup> Indeed, the common law is still the only remedy for these victims.<sup>16</sup> The relevant common law actions include trespass, nuisance, negligence and strict liability.<sup>17</sup>

Common law actions for exposure to hazardous waste present three difficulties.<sup>18</sup> First, statutes of limitations generally require the commencement of the action within two to four years after the defendant commits the tortious act.<sup>19</sup> A potential plain-

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8. PRP is a term of art for potentially responsible party under CERCLA section 107(a). For a discussion of PRPs, see *infra* notes 61-64 and accompanying text.

9. For the purposes of this Comment, "contractual releases" will include: indemnities, releases, hold harmless agreements, exculpatory clauses and disclaimers. "Contractual release" and "release" will be used interchangeably.

10. For a discussion of other means to circumvent CERCLA liability, see *infra* notes 87-89 and accompanying text.

11. See *infra* notes 91-158 and accompanying text.

12. See *infra* notes 159-161 and accompanying text.

13. See *infra* notes 162-206 and accompanying text.

14. Other statutes that regulate hazardous waste are the Resource Conservation and Recovery Act of 1976 § 3001, 42 U.S.C. § 6921 (1982) [hereinafter RCRA] and the Safe Drinking Water Act of 1974, 42 U.S.C. § 300f (1982).

15. *Toxic Waste Litigation*, *supra* note 3, at 1467.

16. *Id.* at 1602. The United States Supreme Court struck down an implied right of action based on violation of a federal environmental statute. *Id.* (citing *Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 11-18 (1981)). The United States Supreme Court also prohibits private party recovery for damages due to environmental waste exposure under a nuisance cause of action. *National Sea Clammers Ass'n*, 453 U.S. at 21-22; *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

17. *Id.* at 1610.

18. *Id.* at 1603-04.

19. *Id.* at 1604.

tiff, however, may not realize she has been exposed until a physical condition manifests itself.<sup>20</sup> Manifestation of the physical condition may not occur until long after the statute of limitations has run.<sup>21</sup> Second, the plaintiff in a common law suit for hazardous waste exposure will have difficulty proving negligence.<sup>22</sup> The plaintiff will have to prove that the defendant's act or omission was unreasonable or that she was a foreseeable plaintiff.<sup>23</sup> Both of these elements are difficult to prove when neither the plaintiff nor the judge have expertise in environmental technology.<sup>24</sup> Third, the plaintiff will have difficulty proving causation.<sup>25</sup> The plaintiff must prove that the hazardous substances caused her injuries and that the defendant released the hazardous substance.<sup>26</sup> In these cases, proving causation is problematic because of both the latency of the manifestation of the injury<sup>27</sup> and the need to rely on epidemiological studies.<sup>28</sup>

The burden placed on the plaintiff who has been exposed to hazardous substances makes recovery for such exposure insurmountable.<sup>29</sup> In addition, because toxic tort cases are so difficult to win, these cases have had little effect in abating the rampant problem of hazardous waste.<sup>30</sup>

## B. Congressional Remedies to Hazardous Waste

In the 1950's and 1960's, Congress enacted several environmental statutes, none of which dealt with the problem of hazardous waste.<sup>31</sup> Hazardous waste was not a priority for three

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20. *Toxic Waste Litigation*, *supra* note 3, at 1604.

21. *Id.*

22. *Id.* at 1611.

23. *Id.*

24. *Id.* at 1612.

25. *Toxic Waste Litigation*, *supra* note 3, at 1617.

26. *Id.*

27. *Id.* at 1618. It may be difficult to find the parties responsible for the release of hazardous waste because of the latency of the injuries from exposure to such substances. *Id.*

28. *Id.* at 1618. Epidemiological studies compare a population exposed to a hazardous substance with a population that has not been exposed. *Id.* The difficulty with epidemiological studies is that they do not prove that the plaintiff's injuries came about from the particular hazardous waste studied; the studies merely prove that the hazardous substance may cause such injuries. *Id.* at 1619.

29. *Toxic Waste Litigation*, *supra* note 3, at 1630.

30. *Id.*

31. *Toxic Waste Litigation*, *supra* note 3, at 1469. Among the noteworthy statutes and amendments during the 1950's, 1960's and 1970's are the following: Clean Air Act of 1955, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at

reasons: (1) hazardous substances are not generally visible to the naked eye; (2) there was a lack of monitoring devices to detect hazardous contamination; and (3) the public did not realize the grave consequences of exposure to hazardous substances.<sup>32</sup>

To alleviate this growing concern, Congress enacted the Safe Drinking Water Act of 1974.<sup>33</sup> This act empowered the Environmental Protection Agency (EPA) to establish standards for drinking water, a system to ensure compliance, and state guidelines for the regulation of hazardous waste.<sup>34</sup> The Act, however, failed to deal with hazardous waste contamination other than through water consumption and failed to address the need for safe means of hazardous waste storage.<sup>35</sup> To redress these omissions, Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA).<sup>36</sup>

RCRA acts prospectively in that it regulates hazardous waste created after 1976.<sup>37</sup> RCRA tracks hazardous substances from creation to disposal.<sup>38</sup> The Act imposes a manifest system.<sup>39</sup> A "manifest," or label, is placed on each barrel of hazardous substances.<sup>40</sup> Each generator and transporter records on the label what it did with the barrels, thus tracking the substances from "cradle-to-grave."<sup>41</sup> RCRA also requires that all hazardous substances be disposed, stored or treated in permitted facilities.<sup>42</sup> Additionally, RCRA imposes a duty on generators and transporters of hazardous substances to report to state and federal agencies the substance involved and the amount of the waste created, transported and disposed.<sup>43</sup> One shortcoming of RCRA is that it

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42 U.S.C. § 7401 (1991)); National Emissions Standards Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (codified as amended at 42 U.S.C. § 7521 (1982); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. § 1251 (1982)).

32. *Toxic Waste Litigation*, *supra* note 3, at 1469-70.

33. 42 U.S.C. §§ 300f (1982), also known as the Public Health Service Act, PHSA §§ 1401 (1979).

34. *Toxic Waste Litigation*, *supra* note 3, at 1470.

35. *Id.*

36. RCRA § 3001, 42 U.S.C. § 6921. RCRA is incorporated in subchapter III of the Solid Waste Disposal Act § 1002, 42 U.S.C. § 6901 (1980).

37. *Toxic Waste Litigation*, *supra* note 3, at 1464.

38. *Id.* at 1470-71.

39. RCRA § 3002(a)(5), 42 U.S.C. § 6922(a)(5).

40. *Toxic Waste Litigation*, *supra* note 3, at 1471.

41. *Id.* at 1470-71.

42. *Id.*

43. RCRA § 3002(a)(6), 42 U.S.C. § 6922(a)(6).

fails to regulate hazardous waste disposed of before 1976.<sup>44</sup> To that end, Congress enacted CERCLA to cleanup such hazardous waste sites.<sup>45</sup>

While RCRA is prospective in tracking hazardous substances, CERCLA is retrospective in that it was enacted to clean up sites that already contain hazardous waste.<sup>46</sup> CERCLA was enacted in 1980 during the final stages of the Carter Administration.<sup>47</sup> To avoid a veto, Congress hastily passed the bill before Ronald Reagan took office as President.<sup>48</sup> Congress, it has been said, enacted "perhaps the most radical environmental statute in American history."<sup>49</sup> In addition to the Act itself being "radical" the courts have expanded the radical nature of CERCLA by interpreting its provisions broadly.<sup>50</sup>

Congress enacted CERCLA in order to establish a rapid environmental response program to protect public health and the environment.<sup>51</sup> CERCLA requires the EPA to establish a National Priority List of those sites that need to be cleaned up and a National Contingency Plan to carry out the cleanups.<sup>52</sup> CERCLA set up a "Superfund" which finances the hazardous waste cleanup costs incurred by the government.<sup>53</sup>

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44. *Toxic Waste Litigation*, *supra* note 3, at 1464.

45. *Id.* at 1472.

46. *Id.* at 1464.

47. *Id.* at 1465 n.1.

48. *Toxic Waste Litigation*, *supra* note 3, at 1465 n.1. Several courts have acknowledged that Congress enacted CERCLA hastily. *United States v. Mottolo*, 605 F. Supp. 898, 902, 905 (D.N.H. 1985); *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1253 (S.D. Ill. 1984).

49. *Toxic Waste Litigation*, *supra* note 3, at 1465.

50. *Id.* at 1465-66. See *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 350 (D.N.J. 1991) (To achieve CERCLA's remedial goals of protecting public health and environment, courts are "obligated to construe its provisions liberally.") (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)). In *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), the Second Circuit held that causation was not required to impose liability on responsible parties. *Id.* at 1044-45. Also, for example, in *United States v. Maryland Bank & Trust, Co.*, 632 F. Supp. 573 (D. Md. 1986), the United States District Court for the District of Maryland held that a bank which presently owned a hazardous waste site through foreclosure was liable under CERCLA. *Id.* at 579.

51. H.R. 1016, 96th Cong., 2d Sess. § 1, at 17 (1980), *reprinted in* (1980) U.S.C.C.A.N. 6119, 6119-20. [hereinafter H.R. 1016]; see *Mobay*, 761 F. Supp. at 349; *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983).

52. CERCLA § 105, 42 U.S.C. § 9605.

53. CERCLA § 111(a), 42 U.S.C. § 9611(a); H.R. 1016, *supra* note 51, at 17. The "Superfund" is a fund set up by Congress from taxes on petroleum, feedstock chemicals, other chemical products, and from the general United States

Once EPA has determined that there has been a release or a threatened release<sup>54</sup> of hazardous substances, EPA has two options.<sup>55</sup> The EPA can (1) clean up the site using the Superfund money<sup>56</sup> and then seek recovery for the costs incurred from the PRPs or (2) require the PRPs to clean up the site.<sup>57</sup> A private party whose property has been contaminated also has two options.<sup>58</sup> It can (1) clean up the site and seek recovery of the costs incurred from EPA Superfund<sup>59</sup> or (2) clean up the site and seek recovery of the costs incurred from the responsible parties.<sup>60</sup>

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revenues. JOHN H. DAVIDSON & ORLANDO E. DELOGU, *FEDERAL ENVIRONMENTAL REGULATION*, Issue 2 (1991). The Hazardous Substance Superfund had in its coffers \$5,100,000,000.00 as of October 1, 1991. CERCLA § 111(a), 42 U.S.C. § 9611(a).

54. For the language of CERCLA § 107, 42 U.S.C. § 9607 see *infra* note 61.

55. *Toxic Waste Litigation*, *supra* note 3, at 1485.

Although the procedural framework of CERCLA is difficult to decipher, it apparently sets out four basic routes to cleanup: (1) direct EPA cleanup under section 104 followed by potential recovery of costs from the responsible parties under section 107; (2) EPA-mandated cleanup by potentially responsible parties under section 106; (3) private party cleanup followed by recovery against the Fund under section 112; and (4) private party cleanup followed by recovery against the responsible parties under section 107.

*Id.*

56. CERCLA § 104(b)(1), 42 U.S.C. § 9604(b)(1).

57. Section 106(a)(2) states in pertinent part: "Any person who receives and complies with the terms of any order issued under subsection (a) ["when the President determines that there may be . . . an actual or threatened release of a hazardous substance"] [ ] may . . . petition the President for reimbursement from the Fund for the reasonable costs of such action . . . ." CERCLA § 106(a)(2), 42 U.S.C. § 9606(a)(2).

58. *Toxic Waste Litigation*, *supra* note 3, at 1497. H.R. 1016, *supra* note 51, at 17. The EPA is empowered "to pursue rapid recovery of the costs incurred for the costs of such actions undertaken by [the administrator] from persons liable therefor and to induce such persons voluntarily to pursue appropriate environmental response actions with respect to hazardous waste sites." H.R. 1016, *supra* note 51, at 17.

59. See *supra* note 57.

60. CERCLA § 107(a), 42 U.S.C. § 9607(a).



### 1. Liability Under CERCLA

CERCLA section 107<sup>61</sup> sets out a broad scope of liability.<sup>62</sup> The Act imposes strict liability on the owner or operator of a hazardous waste site; any person who owned or operated the site when the hazardous waste was disposed at the site; any person who arranged for disposal or treatment of the waste; and any person who accepted to transport the hazardous waste.<sup>63</sup> Thus, CERCLA covers four classes of persons who are engaged in the production/transportation/disposal cycle of hazardous waste: past and present owners, operators, transporters and generators.<sup>64</sup> These persons are liable for the removal costs, other costs incident to the cleanup, and damages for injury to the destruction of natural resources.<sup>65</sup>

### 2. Defenses to CERCLA Liability

PRPs under CERCLA have three limited<sup>66</sup> defenses: "an act of God, an act of war, or an act or omission of a third party."<sup>67</sup>

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61. Section 107(a) states in pertinent part:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner or operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person from which there is a release or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State . . .

(C) damages for injury to, destruction of, or loss of natural resources . . . .

CERCLA § 107(a), 42 U.S.C. 9607(a).

62. *Toxic Waste Litigation*, *supra* note 3, at 1513.

63. H.R. 1016, *supra* note 51, at 33.

64. *Toxic Waste Litigation*, *supra* note 3, at 1514.

65. CERCLA § 107, 42 U.S.C. § 9607.

66. *Toxic Waste Litigation*, *supra* note 3, at 1544-45.

67. Section 107(b) states in pertinent part:  
Defenses

There shall be no liability under subsection (a) of this section for a

The Second Circuit in *New York v. Shore Realty Corp.*<sup>68</sup> held that each of these defenses “carves out from liability an exception based on causation.”<sup>69</sup> The court reasoned that requiring a showing of causation in the *prima facie* case was superfluous.<sup>70</sup> Therefore, the defendants have the burden of proving causation under the 107(b) defenses.<sup>71</sup>

### C. The Confusion Regarding Contractual Releases of Environmental Liability

Because CERCLA imposes strict liability and provides limited defenses, responsible parties have sought to avoid environmental liability through contractual releases.<sup>72</sup> Contractual releases implicate section 107(e) of CERCLA. Section 107(e) states in full:

- (1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement

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person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
- (4) any combination of the foregoing paragraphs.

CERCLA § 107(b), 42 U.S.C. 9607(b).

68. *New York v. Shore Realty*, 759 F.2d 1032 (2d Cir. 1985).

69. *Id.* at 1044.

70. *Id.*

71. *Id.* The defendant has the burden of proving these defenses by a preponderance of the evidence. *Id.*

72. Responsible parties have also attempted to circumvent CERCLA liability through procedural requirements under section 104. For a more detailed discussion of these procedural defenses, see *Toxic Waste Litigation*, *supra* note 3, at 1548.

- to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.
- (2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.<sup>73</sup>

The first sentence of section 107(e)(1) appears to prohibit all contractual releases. The second sentence of section 107(e)(1), on the other hand, appears to permit contractual releases. Additionally, section 107(e)(2) appears to emphasize that a responsible party can bring a cause of action against another party.<sup>74</sup> Confusion stems from three levels of disagreement about the effect of CERCLA on contractual releases. First, courts are split in determining the law to apply to determine the validity of releases in the context of CERCLA section 107(e).<sup>75</sup> Most courts hold that Congress intended federal common law to govern liability issues.<sup>76</sup> However, courts are split over whether state law or federally created law should provide the content of the federal common law.<sup>77</sup> Second, courts disagree about whether a particular

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73. CERCLA § 107(e), 42 U.S.C. § 9607(e).

74. Also, the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 6901 (1986) [hereinafter SARA] added to CERCLA a provision expressly permitting a responsible party to seek contribution from any other responsible party. CERCLA § 113(f), 42 U.S.C. § 9613(f) (1988). The section states as follows:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims . . . shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

CERCLA § 113(f), 42 U.S.C. § 9613(f).

75. For a discussion of the applicable law, see *infra* notes 91-158.

76. The governing case is *Dice v. Akron, Canton & Youngstown Ry.*, 342 U.S. 359, 361 (1952).

77. Several courts use state law to interpret CERCLA liability and the contractual release for various reasons. See *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986); *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022 (N.D. Cal. 1990), *rev'd on other grounds sub nom. Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 1992 WL 44492 (9th Cir. March 12, 1992); *International Clinical Lab. v. Stevens*, 710 F. Supp. 466 (E.D.N.Y. 1989); *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563 (E.D. Pa. 1988); *Lyncott Corp. v. Chemical Waste Management, Inc.*, 690 F. Supp. 1409 (E.D. Pa. 1988).

release covers CERCLA liability when the release was entered into before CERCLA was enacted or when the release does not expressly mention environmental liability.<sup>78</sup> Some courts hold that to validate release of CERCLA liability, the release must have been entered into after CERCLA was enacted and must expressly include a release of CERCLA liabilities.<sup>79</sup> Third, courts are split as to the proper interpretation of the two seemingly conflicting sentences of section 107(e)(1).<sup>80</sup> In *Mardan Corp. v. C.G.C. Music, Ltd.*,<sup>81</sup> the Ninth Circuit interpreted the provision to mean that private parties can release liability between themselves but cannot avoid reimbursing the government for cleanup costs.<sup>82</sup> In *AM*

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Some courts apply state law to interpret the release itself and federal law to interpret CERCLA. See *AM Int'l v. International Forging Equip.*, 743 F. Supp. 525 (N.D. Ohio 1990); *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994 (D.N.J. 1988). For further discussion of whether state or federal law should apply, see *infra* notes 91-158 and accompanying text.

78. See *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 358 (D.N.J. 1991). In *Mobay*, the court held that where the release was entered into prior to the enactment of CERCLA, in order for the court to find a waiver of CERCLA liability, the release must mention the acceptance of "environmental-type" liabilities. *Id.* at 358. See also *Southland*, 696 F. Supp. at 1002. The *Southland* court held that the release language must expressly include hazardous waste liability. *Id.* The court stated that "[t]he Agreement between Southland and Ashland is completely lacking in any language which expressly releases Ashland from future liabilities based on its hazardous waste disposal practices or imposes this liability on Southland. To imply such an agreement would require the court to engage in 'judicial legislation that would reshape CERCLA's liability scheme.'" *Id.* (quoting *Chemical Waste Management v. Armstrong World Indus.*, 669 F. Supp. 1285, 1294 (E.D. Pa. 1987)). Other courts have held that express language referring to hazardous waste liability is not required in order for the court to find a transfer of CERCLA liability. See *Jones-Hamilton*, 750 F. Supp. at 1027. The *Jones-Hamilton* court determined that the release does not have to include "CERCLA-type" liabilities. *Id.* Accord *AM Int'l*, 743 F. Supp. at 530. In addition, in *AM International* the court held that the release encompasses CERCLA liability even though the release does not so state. *AM Int'l*, 743 F. Supp. at 530.

79. *Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448, 1457 (N.D. Ind. 1990); *Chemical Waste Management v. Armstrong World Indus.*, 669 F. Supp. 1285, 1294-95 (E.D. Pa. 1987); *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285, 1292 (D. Minn. 1987). For a discussion of the interpretation of contractual releases, see *infra* notes 158-160.

80. See Penny L. Parker & John Slavich, *Contractual Efforts to Allocate the Risk of Environmental Liability: Is There a Way to Make Indemnities Worth More Than the Paper They Are Written On?*, 44 Sw. L.J. 1349, 1361 (1991) [hereinafter Parker & Slavich].

81. 804 F.2d 1454 (9th Cir. 1986). See *infra* notes 165-170 and accompanying text.

82. *Id.* at 1459; accord *Purolator Products Corp. v. Allied-Signal, Inc.*, 772 F. Supp. 124 (W.D.N.Y. 1991); *Niecko v. Emro Mktg. Co.*, 769 F. Supp. 973 (E.D. Mich. 1991). For a discussion of *Purolator Products*, see *infra* notes 171-177 and accompanying text. For a discussion of *Niecko*, see *infra* notes 179-185 and accompanying text.

*International v. International Forging Co.*,<sup>83</sup> the United States District Court for the Northern District of Ohio held that releases between liable parties are generally invalid, but are valid between a PRP and those who would not otherwise be liable under CERCLA.<sup>84</sup>

These three levels of disagreement are important to hazardous waste litigation because CERCLA's power is expansive.<sup>85</sup> CERCLA imposes broad liability and affords only three narrow exceptions to such liability.<sup>86</sup> When faced with huge cleanup costs and an action for compensation, PRPs may be forced to declare bankruptcy in order to avoid liability.<sup>87</sup> Another means to circumvent liability is through insurance coverage.<sup>88</sup> Insurance companies, however, are designing specific policies with specific coverage periods which may not cover the PRPs' liability.<sup>89</sup> A third means to circumvent liability is to include a contractual release of environmental liability in the contract of sale for the hazardous waste site.<sup>90</sup>

### III. THE APPLICABLE LAW

The threshold issue is which law to apply to interpret section 107(e)(1). As a matter of statutory interpretation, where a statute is ambiguous, the court should look to legislative history.<sup>91</sup> CERCLA section 107(e)(1) is clearly ambiguous because it contains two inconsistent sentences.<sup>92</sup> CERCLA's legislative history indicates that where liability issues are unclear, traditional common law principles apply.<sup>93</sup> Courts typically have determined that the legislative history refers to federal common law.<sup>94</sup>

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83. 743 F. Supp. 525 (N.D. Ohio 1990). For a discussion of *AM Int'l*, see *infra* notes 186-202 and accompanying text.

84. *Id.* at 529.

85. *Toxic Waste Litigation*, *supra* note 3, at 1465-66.

86. For a discussion of CERCLA liability and defenses, see *supra* notes 61-71 and accompanying text.

87. *Toxic Waste Litigation*, *supra* note 3, at 1585.

88. *Id.* at 1574.

89. *Id.* at 1577.

90. See *Parker & Slavich*, *supra* note 80, at 1349.

91. *Toxic Waste Litigation*, *supra* note 3, at 1525.

92. For a discussion of CERCLA section 107(e)(1), see *supra* note 73 and accompanying text.

93. 126 CONG. REC. 30,932 (1980). A sponsor of CERCLA, Senator Randolph, stated that "[i]t is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law." *Id.*

94. *Toxic Waste Litigation*, *supra* note 3, at 1526. See *Mobay Corp. v. Allied-*

Next, the court must determine the content of the federal common law.<sup>95</sup> Even though federal law governs, courts are not required to use federal rules of decision.<sup>96</sup> Instead, courts may use state common law to give the federal common law its content.<sup>97</sup> Courts are split as to whether judges should develop a uniform federal rule of decision or incorporate state law to provide the content of the federal common law.<sup>98</sup>

In *United States v. Kimbell Foods, Inc.*,<sup>99</sup> the Supreme Court introduced a test to remedy this conflict.<sup>100</sup> *Kimbell Foods* concerns priority of liens. In particular, the Court discusses whether government liens have priority over private party liens.<sup>101</sup> The threshold issue is whether a uniform federal rule of decision

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Signal, Inc., 761 F. Supp. 345, 351 (D.N.J. 1991) ("Federal law always governs the validity of releases of federal causes of action.") (citing *Dice v. Akron, Canton & Youngstown Ry.*, 342 U.S. 359, 361 (1952)); *accord Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 (9th Cir. 1986).

95. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979); *Mobay*, 761 F. Supp. at 351; See *Toxic Waste Litigation*, *supra* note 3, at 1526.

96. See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983) ("State law as a rule of decision is not mandated under the Erie doctrine in this case because it falls within the exception provided for federal laws") (citation omitted).

97. *Kimbell Foods*, 440 U.S. at 727-28; *Mardan*, 804 F.2d at 1457.

98. For a discussion of *Chem-Dyne* and *Mobay*, which apply federal rules of decision to give CERCLA its content, and *Mardan*, which applies state law to give CERCLA its content, see *infra* notes 110-157 and accompanying text.

99. 440 U.S. 715 (1979).

100. *Kimbell Foods*, 440 U.S. at 728-29. The Supreme Court asserted that "[f]ederal law . . . controls the Government's priority rights." *Id.* at 727. However, because Congress failed to express its intent as to whether to incorporate state law or create a uniform federal law, the Court applied the three-part test to determine if state law is appropriate. *Id.* at 727-29. The Court explained that when Congress fails to state whether federal law or state law governs, federal courts are to fill in the gaps left by the federal statute "according to their own standards." *Kimbell Foods*, 440 U.S. at 727 (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)). Thus, *Kimbell Foods* applies to cases where Congress failed to expressly delineate whether federal law or state law should be applied. *Kimbell Foods*, 440 U.S. at 727. *Kimbell Foods* is applicable in contractual release cases under CERCLA section 107(e)(1) because Congress did not expressly state which type of law should be applied to give content to CERCLA. See *Mardan*, 804 F.2d at 1458; *Mobay*, 761 F. Supp. at 351.

101. *Kimbell Foods*, 440 U.S. at 718. This case is a combination of two cases. In the first case, O.K. Super Market had two liens against its personal property. *Id.* The first lien on O.K. Super Market's property was held by a private corporation. *Id.* O.K. Super Market obtained a loan through the Small Business Administration (SBA), under the SBA, and this is the basis for the second government lien. *Id.* The private lien preceded the government's lien. *Id.*

In the second case, Ralph Bridges, a farmer, obtained loans from the Farmers Home Administration (FHA) under the Consolidated Farmers Home Administration Act of 1961. *Id.* at 723. The FHA had a security interest in Bridges' property and farm equipment. *Id.* Bridges failed to pay for his tractor repairs. *Id.* The repairman kept the tractor and obtained a lien on it. *Id.* Bridges filed

should be created or whether state common law should provide the content of the federal common law used to interpret the governing federal statute.<sup>102</sup> The Court looked to see whether Congress stated explicitly that federal rules of decision would govern.<sup>103</sup> Because Congress failed to state explicitly that federal rules of decision should give the federal common law its content, the Court developed a three-part test.<sup>104</sup> Under that test, a court must apply state law unless: (1) the issue, by its nature, requires uniform federal rules; (2) state law would frustrate the objective of the federal law; or (3) uniform federal rules would frustrate commercial relationships.<sup>105</sup> Under the three-part test, the *Kimbell Foods* Court held that state law applied.<sup>106</sup> The Court reasoned that applying state law would not frustrate the administration of government loan programs because these loan programs were incorporated into state law.<sup>107</sup> Also, the Court did not want to create more uncertainty by developing uniform fed-

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for bankruptcy and was discharged of his debts. *Id.* The United States brought a cause of action against the repairman for the tractor. *Id.* at 724.

Neither the SBA nor the Consolidated Farmers Home Administration Act contained provisions dealing with the priority of liens. *Id.* at 723. Thus, the issue for the Court was whether a uniform federal law or state common law applied. *Id.* at 727.

102. *Id.*

103. *Id.* at 740.

104. *Id.* at 728-29. The Court sets out the *Kimbell Foods* test as follows: Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests, and to the effects upon them of applying state law.'

Undoubtedly, federal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules. Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision. Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests. Finally, our choice-of-law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.

*Id.* (citations and footnotes omitted).

Had Congress stated that federal law should be applied, then the Court would have applied federal law.

105. *Kimbell Foods*, 440 U.S. at 728-29. For a discussion of *Chem-Dyne*, see *infra* notes 116-127 and accompanying text. See also *Mardan Corp. v. C.G.C Music, Ltd.*, 804 F.2d 1454, 1458-60 (9th Cir. 1986); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 351-52 (D.N.J. 1991); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 809 (S.D. Ohio 1983).

106. *Kimbell Foods*, 440 U.S. at 740.

107. *Id.* at 729-30.

eral rules when state law already exists.<sup>108</sup> Additionally, the Court found no national interest compelling the application of federal law.<sup>109</sup>

Although the facts of *Kimbell Foods* are not on point, the case is important because the Court developed the three-part test to determine which law applies to give federal common law its content. Because Congress did not specify in the legislative history of CERCLA whether courts should develop uniform federal rules or allow state law to give CERCLA its content, the three-part test in *Kimbell Foods* is implicated.<sup>110</sup>

#### A. Analytical Application of *United States v. Kimbell Foods, Inc.*

A number of courts have analyzed the *Kimbell Foods* test in relation to CERCLA liability. In *United States v. Chem-Dyne Corp.*,<sup>111</sup> the District Court for the Southern District of Ohio applied the *Kimbell Foods* test in relation to general liability under CERCLA and determined that uniform federal rules of decision should be applied to interpret CERCLA's liability provisions.<sup>112</sup> The *Mobay Corp. v. Allied-Signal, Inc.*<sup>113</sup> decision is an example of a case that followed the *Chem-Dyne* analysis and extended its holding to the area of contractual releases and CERCLA liability. In *Mobay*, the United States District Court for the District of New Jersey also applied uniform federal rules of decision to give CERCLA its content in relation to contractual releases of envi-

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108. *Id.* at 738-39. The Court stated in part:

In structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved. However, subjecting federal contractual liens to the doctrines developed in the tax lien area could undermine that stability. Creditors who justifiably rely on state law to obtain superior liens would have their expectations thwarted whenever a federal contractual security interest suddenly appeared and took precedence.

*Id.* at 739. (citations omitted).

109. *Id.*

110. *Kimbell Foods*, 440 U.S. at 727.

111. 572 F. Supp. 802.

112. *Id.* at 808-09. The court was not faced with the issue whether federal or state law should give CERCLA its content in relation to contractual releases.

113. *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 351-52 (D.N.J. 1991).



ronmental liabilities.<sup>114</sup> In *Mardan Corp. v. C.G.C. Music, Ltd.*,<sup>115</sup> on the other hand, the United States Court of Appeals for the Ninth Circuit used state law to interpret CERCLA.<sup>116</sup>

1. *The United States v. Chem-Dyne Corp. Analysis: Federal Rules of Decision Provide Content for CERCLA*

The seminal case in determining which law to apply to give CERCLA its content is *United States v. Chem-Dyne Corp.*<sup>117</sup> In this case the United States District Court for the Southern District of Ohio applied federal rules of decision to interpret CERCLA liability.<sup>118</sup> The United States brought an action under CERCLA to compel twenty-four defendants to reimburse the government for the cleanup of hazardous waste at the Chem-Dyne plant.<sup>119</sup> Defendant, Chem-Dyne Corporation, moved for summary judgment claiming that it was not jointly and severally liable under CERCLA.<sup>120</sup> The court noted that CERCLA's legislative history states that federal common law applies in interpreting the scope of CERCLA liability because regulating hazardous substances is "of national magnitude involving uniquely federal interests."<sup>121</sup> In addition, Congress enacted CERCLA because state response

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114. *Id.* at 351-52. The United States District Court for the Northern District of California applied federal law to interpret CERCLA in relation to a contractual release. *Wiegmann & Rose Int'l v. NL Indus.*, 735 F. Supp. 957, 962 (N.D. Cal. 1990). However, the court did not analyze the *Kimbell Foods* test in order to come to that conclusion. *Id.* The court also stressed that the conclusion the court reached would not be different under state law. *Id.* at 962 n.4.

115. 804 F.2d 1454 (9th Cir. 1986).

116. *Id.* at 1458-59.

117. 572 F. Supp. 802 (S.D. Ohio 1983). Although this case applied federal common law to CERCLA liability in general, it did not specifically refer to section 107(e)(1). *See also Mobay*, 761 F. Supp. at 351-52; *Lyncott Corp. v. Chemical Waste Management*, 690 F. Supp. 1409, 1417 (E.D. Pa. 1988).

118. *Chem-Dyne*, 572 F. Supp. at 808-09. A "uniform federal law" is law created by the federal judiciary. The law created by the federal judiciary is uniform because federal laws go beyond state boundaries. In addition, the United States Supreme Court may elect to pass judgement on the law and make it binding in all circuits.

119. *Id.* at 804.

120. *Id.* The District Court denied Chem-Dyne's motion because it found that Chem-Dyne failed to prove that there exists no material issues of fact. *Id.* at 811.

121. *Id.* at 808. The court points out that the "*Erie* doctrine" created by the Supreme Court in *Erie v. Tompkins*, 304 U.S. 64 (1938), extinguished the federal government's power to create a federal common law. *Chem-Dyne*, 572 F. Supp. at 808. However, *Erie* does not proscribe creating a specialized federal common law when it is "necessary to protect uniquely federal interests." *Id.* (quoting *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

to hazardous waste was lacking.<sup>122</sup>

The court then addressed the issue whether a uniform federal rule or state law should give CERCLA its content.<sup>123</sup> Applying the *Kimbell Foods* test, the court found that CERCLA is a federal program which by its nature necessitates applying uniform federal rules of decision.<sup>124</sup> In support of this holding, the court cited to a statement in the legislative history made by United States Representative James Florio (D-NJ)<sup>125</sup> that federal rules of decision should give CERCLA its content.<sup>126</sup> Additionally, the court noted that using state law to give CERCLA its content would frustrate the rapid cleanup of hazardous waste sites because state laws would not be uniform.<sup>127</sup> More importantly, the Congressional Committee on Energy and Commerce adopted the *Chem-Dyne* analysis in 1986.<sup>128</sup>

## 2. *The Mobay Corp. v. Allied-Signal, Inc. Analysis: Federal Rules of Decision Provide Content for CERCLA*

In a more recent case, the United States District Court for the District of New Jersey applied a uniform federal rule of decision where the parties entered into a contractual release of CERCLA liability.<sup>129</sup> In *Mobay Corp. v. Allied-Signal, Inc.*, Mobay, the present owner of a hazardous waste site, brought a cause of action against the former owners for contribution under CERCLA section 107 and section 113.<sup>130</sup> Allied-Signal, one of the former owners of

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122. *Chem-Dyne*, 572 F. Supp. at 808.

123. *Id.* at 809.

124. *Id.*

125. Representative Florio was a sponsor of the CERCLA bill. *Id.* at 807. While statements of a single congressman are not controlling, a statement by a sponsor of the legislation is afforded "substantial weight." *Id.*

126. *Chem-Dyne*, 572 F. Supp. at 809. Representative Florio stated that "[t]o insure the development of a uniform rule of law, and to discourage business dealing in hazardous substances from locating primarily in States with more lenient laws, [CERCLA] will encourage the further development of a Federal common law in this area." *Id.* (quoting 126 CONG. REC. H11787 (Dec. 3, 1980)).

127. *Id.*

128. H.R. REP. NO. 253, 99th Cong., 1st Sess. § 74 reprinted in 1986 U.S.C.A.N. 2835, 2856; see *Niecko v. Emro Mktg. Co.*, 769 F. Supp. 973, 987 (E.D. Mich. 1991). In effect, Congress meant that federal rules of decision are to give CERCLA its content in relation to liability.

129. *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 351-52 (D.N.J. 1991). This court follows the reasoning in Judge Reinhardt's dissent in *Mardan*. *Id.*

130. For a discussion of CERCLA section 113 see *supra*, note 74. The owner also asserted a number of state claims including strict liability in tort, negligence, restitution, contribution, indemnification, and contractual breach of warranties and representations. *Id.* at 348.

the site, alleged, *inter alia*, that the contractual release transferred CERCLA liability to Mobay, and that Allied-Signal was no longer liable under CERCLA.<sup>131</sup> The court held that Allied-Signal could not rely on the contractual release because it did not include clear language of a transfer of CERCLA liability.<sup>132</sup> Therefore, the court concluded that Mobay could pursue its contribution claim.<sup>133</sup>

The *Mobay* court noted that CERCLA's legislative history "strongly suggests a Congressional directive to federal courts to develop uniform federal rules, [however] CERCLA does not contain a specific assertion of Congressional intent."<sup>134</sup> The court failed to find a clear Congressional intent to implement a federal rule of decision, and thus, applied the *Kimbell Foods* three-part test.<sup>135</sup> The court found that under the first element,<sup>136</sup> uniformity of federal law is "necessary to prevent the vagaries of differing state laws from affecting the incentive for voluntary cleanup."<sup>137</sup> Additionally, the court pointed out that CERCLA demonstrates the "substantial federal interest" in reducing hazardous substances.<sup>138</sup> Examining the second element,<sup>139</sup> the court found that applying state law would frustrate CERCLA's objective of rapid response to hazardous waste cleanup because state law would not be able to enforce contribution.<sup>140</sup> Therefore, state

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131. *Id.* at 348-49.

132. *Id.* at 358. For a discussion of the interpretation of the release itself, see *infra* notes 159-161.

133. *Id.*

134. *Mobay*, 761 F. Supp. at 351.

135. *Id.* at 351-52. See *supra* notes 99-105 and accompanying text.

136. For the *Kimbell Foods* test, see *supra* notes 99-105 and accompanying text.

137. *Mobay*, 761 F. Supp. at 351 (citing *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1464 (9th Cir. 1986) (Reinhardt, J., dissenting)); see *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1202 (E.D. Pa. 1989); *United States v. Mottolo*, 695 F. Supp. 615, 624 (D.N.H. 1988); *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. 22, 31 (D. Mass. 1987).

138. *Mobay*, 761 F. Supp. at 351 (citing *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1255 (S.D. Ill. 1984)).

139. For the *Kimbell Foods* test, see *supra* note 99-105 and accompanying text.

140. *Mobay*, 761 F. Supp. at 351-52 (citing *Mardan*, 804 F.2d at 1465 (Reinhardt, J., dissenting)). See also *Wiegmann & Rose Int'l v. NL Indus.*, 735 F. Supp. 957, 962 (N.D. Cal. 1990). Under state law the court would not be able to enforce contribution because if the present owner of a hazardous waste site has no power to enforce contribution on a former owner, the present owner may delay cleanup until the government initiated the cleanup. *Mobay*, 761 F. Supp. at 351-52. The court noted two disadvantages: "[f]irst, the government's ability to monitor numerous sites and initiate cleanups on a nationwide basis is constrained by limited resources. Second, government action is supposed to be a

law would create a disincentive for the present owner to voluntarily cleanup the hazardous waste.<sup>141</sup> Applying the third element,<sup>142</sup> the court found that establishing a federal rule of decision would not frustrate commercial relationships based on state law because "federal law always governs the validity of releases of federal causes of action."<sup>143</sup> The court noted that releases of CERCLA liability "must be prepared in light of applicable federal law regarding other CERCLA provisions."<sup>144</sup> Therefore, the *Mobay* court held that federal common law should govern CERCLA contractual releases.<sup>145</sup>

### 3. *The Mardan Corp. v. C.G.C. Music, Ltd. Analysis: State Common Law Provides Content for CERCLA*

Despite the persuasive uniform federal rule of decision argument, some federal courts still apply state common law.<sup>146</sup> In *Mardan Corp. v. C.G.C. Music, Ltd.*,<sup>147</sup> the United States Court of Appeals for the Ninth Circuit, like the courts in *Chem-Dyne* and *Mobay*, held that federal common law applied because "federal law always governs the validity of releases of federal causes of action."<sup>148</sup> The court determined that since Congress did not demonstrate its intent that federal judges create federal rules of

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last resort, only after the failure of voluntary efforts." *Id.* at 352 (citations omitted).

141. *Mobay*, 761 F. Supp. at 351-52.

142. For the *Kimbell Foods* test, see *supra* note 99-105 and accompanying text.

143. *Mobay*, 761 F. Supp. at 351-52. The *Mobay* court stated that a uniform federal common law would not frustrate commercial relationships based on state law because parties expect federal laws to govern "federal releases." *Id.* at 352. The court also pointed out that contracts that deal with CERCLA in areas other than liability must be drafted in accordance with federal law. *Id.* (citing *Mardan*, 804 F.2d at 1465 (Reinhardt, J., dissenting)).

144. *Mobay*, 761 F. Supp. at 352. *But see* notes 145-153 and accompanying text.

145. *Id.* at 352.

146. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457-58 (9th Cir. 1986); *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022, 1024 (N.D. Cal. 1990) *rev'd on other grounds sum nom.* *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 1992 WL 44492 (9th Cir. March 12, 1992); *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1001 (D.N.J. 1988); *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563, 1567 (E.D. Pa. 1988). "Clearly the fact that federal law governs does not always mean that federal courts should fashion a uniform federal rule, even if the federal question involves the scope of a federal statutory right or the interpretation of a phrase in a federal statute." *Mardan*, 804 F.2d at 1457-58 (citation omitted).

147. 804 F.2d 1454 (9th Cir. 1986).

148. *Id.* at 1457.

decision,<sup>149</sup> the *Kimbell Foods* test was implicated.<sup>150</sup> Unlike the courts in *Chem-Dyne* and *Mobay*, however, the *Mardan* court held that state law applied where the plaintiff, the purchaser of a hazardous waste site, contractually released the defendant, seller, of all liability in the purchase agreement.<sup>151</sup> The court concluded that state law applied to give the federal common law its content because companies use state law to draft contracts of sale and insurance contracts.<sup>152</sup> In addition, the court concluded that uniformity of the law was not necessary and that the application of state law would not frustrate the purpose of CERCLA because under the court's interpretation of section 107(e)(1), contractual releases are invalid against the government.<sup>153</sup> The court qualified its holding by pointing out that where state law is hostile to federal law, federal law governs.<sup>154</sup>

#### B. Analysis of *Chem-Dyne*, *Mobay*, and *Mardan*

These cases are similar in that the courts agree that federal common law applies where there is a contractual release of environmental liability. Additionally, all three cases applied the *Kimbell Foods* test. The courts are split, however, as to whether uniform federal rules of decision or state law should give the federal law its content.

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149. *Id.* at 1458.

150. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 735 (1979). The Court in *Kimbell Foods* noted that if Congress had intended that there be a federal priority system, then Congress would have created such a system. *Id.* Thus, the Court concluded that in the absence of Congressional intent to create a federal priority system, state laws were implicated. *Id.* However, the Court qualified this conclusion by requiring that the state law meet the three-part test. *Id.* at 728-29.

151. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1458-59 (9th Cir. 1986).

152. *Id.*

153. *Id.* at 1458. For a detailed analysis of the court's interpretation of section 107(e)(1) see *infra* notes 165-170 and accompanying text. The court also stated that applying federal law would frustrate the "commercial relationships predicated on state law." *Id.* at 1460.

154. *Mardan*, 804 F.2d at 1458. *See* Wiegmann & Rose Int'l v. NL Indus., 735 F. Supp. 957, 961 (N.D. Cal. 1990).

Other courts have rejected both the *Chem-Dyne* and *Mobay* analysis and applied a mixture of both federal and state law. *See* Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1001 (D.N.J. 1988). Generally, these courts apply federal law to interpreting CERCLA and state law in interpreting the contractual release. As an example, in *Southland*, the United States District Court for the District of New Jersey used state law because the contractual release contained a choice of law provision which dictated that state law would apply. *Id.* However, the court applied federal law. *Id.*

In applying the *Kimbell Foods* test, the *Chem-Dyne* court found that environmental protection was of national magnitude, thus satisfying the first part of the *Kimbell Foods* test.<sup>155</sup> The *Chem-Dyne* court, however, did not apply the next two prongs of the test to the facts of the case, but concluded that a uniform federal rule of decision should be applied to define CERCLA. The *Mobay* court, which was faced with a contractual release of liability, applied all three elements of the *Kimbell Foods* test.<sup>156</sup> The court reasoned that state law would frustrate the purpose of CERCLA and that applying federal common law would not create a tension in commercial relations based on state law.<sup>157</sup> The *Mardan* court, on the other hand, held that state law should give the federal law its content instead of creating a federal common law. The court based this holding partially on its interpretation of 107(e)(1) and partially on its conclusion that state law would not frustrate the purposes of CERCLA.<sup>158</sup>

#### IV. INTERPRETATION OF THE CONTRACTUAL RELEASE

In addition to the debate about which law to apply, courts are also divided about the interpretation of contractual releases of environmental liability.<sup>159</sup> In order to uphold the contractual release, some courts have held that there must be an express assumption of environmental liability by one of the parties.<sup>160</sup>

155. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983).

156. *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 351 (D.N.J. 1991).

157. *Mobay*, 761 F. Supp. at 351.

158. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986). "[T]he application of state law to interpret such releases will not frustrate the objectives of CERCLA. Contractual arrangements apportioning CERCLA liabilities between private 'responsible parties' are essentially tangential to the enforcement of CERCLA's liability provisions." *Id.*

159. *See Parker & Slavich*, *supra* note 80, at 1359-60.

160. *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1002 (D.N.J. 1988) (citing *Chemical Waste Management v. Armstrong World Indus.*, 669 F. Supp. 1285, 1294 (E.D. Pa. 1987)); *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285, 1292 (D. Minn. 1987). In *FMC Corp.*, the release stated that seller "shall be released 'from all claims, demands and causes of action which FMC has, had or may have arising under the [contract of sale from seller to FMC].'" *FMC Corp.*, 668 F. Supp. at 1292. (quoting release at issue) (emphasis added). The United States District Court for the District of Minnesota concluded that the release was an express release of all future claims including CERCLA liability. *Id. Contra Mardan*, 804 F.2d at 1462. Notably, the release in *Mardan* transfers liability from the seller to *Mardan* "'based upon, arising out of or in any way relating to the Purchase Agreement.'" *Id.* (quoting the release at issue). Although the release in *Mardan* is similar to the one in *FMC Corp.* and both courts upheld the respective releases, the Ninth Circuit in *Mardan* did not re-

However, where the release has been entered into prior to the enactment of CERCLA, courts are reluctant to uphold a release of CERCLA liability unless the contract contains "some clear transfer or release of future 'CERCLA-like' liabilities . . . ." <sup>161</sup>

quire express release language. *Id.* But see *Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448, 1457 (N.D. Ind. 1990). In *Rodenbeck*, the release between buyer and seller transferred to buyer "all claims and obligations of any character or nature whatsoever arising out of or in connection with said agreements. . . ." *Id.* (quoting release at issue). The court held that the release expressly released seller of CERCLA liability. *Id.*

"As is" clauses are especially troubling. See *Parker & Slavich*, *supra* note 80, at 1363. An example of an "as is" clause was the one examined in *Niecko v. Emro Mktg. Co.*, 769 F. Supp. 973, 975 (E.D. Mich. 1991). The "as is" clause in *Niecko* stated, in pertinent part:

It is expressly agreed that Seller makes no warranties that the subject property complies with federal, state or local governmental law or regulations . . . . Buyer has fully examined and inspected the property and takes the property in its existing condition with no warranties of any kind concerning the condition of the property or its use. . . . Buyer acknowledges that he has inspected and is familiar with the condition of the property; that Seller has not made and makes no warranties or representations as to the condition of said property, including but not limited to, soil conditions . . . . Buyer is purchasing the same "as is"; that he assumes all responsibility for any damages caused by the conditions on the property upon transfer of title.

*Id.* at 975.

By their very nature, "as is" clauses do not include express agreements to assume CERCLA liability, and as a result they provide even more difficulty for the courts. Where an agreement contains an "as is" clause without an express intent to accept environmental liability, some courts hold that the clause covers breach of warranty but not environmental liability. See *Allied Corp. v. Frola*, 730 F. Supp. 626, 630 (D.N.J. 1990) ("as is" clause prohibits contractual release theories of contribution but permits tort theory of recovery); *Wiegmann & Rose Int'l Corp. v. NL Indus.*, 735 F. Supp. 957, 961 (N.D. Cal. 1990); *International Clinical Lab. v. Stevens*, 710 F. Supp. 466, 469 (E.D.N.Y. 1989); *Channel Master Satellite Sys. v. JFD Elecs.*, 702 F. Supp. 1229, 1232 (E.D.N.C. 1988); *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1001 (D.N.J. 1988). *Contra* *Niecko v. Emro Mktg. Co.*, 769 F. Supp. 973, 978-79 (E.D. Mich. 1991) (court held that if the "as is" clause is to have any meaning, the court must interpret the "as is" clause as including CERCLA liability). For a more thorough discussion of *Niecko*, see *infra* notes 178-184.

In *Wiegmann & Rose*, the buyer of a hazardous waste site entered into an "as is" clause in the contract of sale. *Wiegmann & Rose*, 735 F. Supp. at 958. The district court held that because the buyer did not have "knowledge, actual or constructive, of the presence of hazardous waste" and the "as is" clause was "standard, boiler-plate" the clause was intended to protect seller from breach of warranty claims. *Id.* at 961. The court reasoned that allowing a responsible party under CERCLA to evade liability by virtue of an "as is" clause entered into prior to the enactment of CERCLA would frustrate the CERCLA objective of rapid response to hazardous waste clean up. *Id.* at 962. Although most courts find that an "as is" clause protects the seller from breach of warranty, some courts will allow a CERCLA cause of action to be established. See *Parker & Slavich*, *supra* note 80, at 1363.

161. *Southland*, 696 F. Supp. at 1002. *Chemical Waste Management v. Armstrong World Indus.*, 669 F. Supp. 1285, 1294-95 (E.D. Pa. 1987) (requiring

Once the court has interpreted whether the release includes environmental liabilities, it will then have to determine whether it will uphold the release. Whether a court upholds the release depends on the court's interpretation of CERCLA section 107(e)(1).

#### A. Two Interpretations of CERCLA Section 107(e)(1)

Courts have interpreted CERCLA section 107(e)(1) in two ways.<sup>162</sup> The majority interpretation involves a cursory look at section 107(e)(1) and holds that contractual releases are valid between PRPs while invalid between a responsible party and the government.<sup>163</sup> The minority interpretation holds that contractual releases are valid between a PRP and a party who would not otherwise be liable under CERCLA.<sup>164</sup>

##### 1. *Upholding Contractual Releases Between Private Parties:*

*Mardan Corp. v. C.G.C. Music, Ltd.*

*Mardan* is the seminal case for the majority interpretation that section 107(e)(1) contractual releases are invalid where the government is seeking reimbursement of cleanup costs but valid between private parties.<sup>165</sup> To that end, the Ninth Circuit in

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express release of liability relating to the disposal of waste). See *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 358 (D.N.J. 1991). In *Mobay*, the court required that the release include a reference to "environmental-type liabilities" in order for it to cover CERCLA liability. *Mobay*, 761 F. Supp. at 358. The release in this case failed to refer to environmental liabilities. *Id.* However, in a footnote the court added that if the release transfers "any type" of liability then this release would also encompass a release of CERCLA liability. *Id.* at 358 n.15 (emphasis omitted).

162. See *supra* notes 80-82 and accompanying text.

163. See *infra* notes 165-170 and accompanying text.

164. See *infra* notes 186-203 and accompanying text.

165. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986). This case deals with a purchase agreement between Mardan, the subsequent operator, and MacMillan, the seller, for the purchase of some assets used in the manufacture of musical instruments. *Id.* at 1456. Mardan released MacMillan of "all actions, causes of action, suits . . . based upon, arising out of or in any way relating to the Purchase Agreement" in return for \$995,000. *Id.* MacMillan deposited hazardous waste on the site and Mardan continued to do so. *Id.* Mardan then was required to clean up the site and instituted a suit for compensation against MacMillan. *Id.*

Other courts that follow the *Mardan* analysis are: *Purolator Products Corp. v. Allied-Signal, Inc.*, 772 F. Supp. 124, 130 (W.D.N.Y. 1991); *Niecko v. Emro Mktg. Co.*, 769 F. Supp. 973, 988-89 (E.D. Mich. 1991); *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1000 (D.N.J. 1988); *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563, 1573 (E.D. Pa. 1988); *Channel Master Satellite Sys. v. JFD Elecs.*, 702 F. Supp. 1229, 1232 (E.D.N.C. 1988) (holding that contractual liability is "not eliminated" by CERCLA section 107(e)(1)); *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285, 1289 (D. Minn. 1987). In *Versatile Metals*, the court stated in pertinent part:



*Mardan* found that contractual releases between PRPs were "tangential" to the government's enforcement of CERCLA.<sup>166</sup> Under this interpretation, the government, as claimant in a CERCLA suit, may recover cleanup costs from all responsible parties under CERCLA regardless of a contractual release.<sup>167</sup> The responsible parties can then sue for contribution based on the contractual releases for the cleanup costs.<sup>168</sup>

The *Mardan* court used public policy to support its conclusion that private parties are free to contract between themselves and that CERCLA does not prohibit this right.<sup>169</sup> The court's analysis upheld the right of private parties to contract while it also upheld CERCLA's purpose of having responsible parties reimburse the government for cleanup costs.<sup>170</sup>

*a. Recent cases applying the Mardan analysis*

A number of recent cases have applied the *Mardan* analy-

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CERCLA's liability provisions, therefore, do not abrogate the parties' contractual rights. . . . A person that is liable under the terms of the Act may by agreement be held harmless or indemnified by another party. . . . [CERCLA section 107(e)(1)] clearly provides that CERCLA liability is not sufficient for the recovery of costs between private parties where one such party has released the other from its CERCLA liability. *Versatile Metals*, 693 F. Supp. at 1573. (citations omitted).

Recently, the Ninth Circuit reiterated its interpretation in *Jones-Hamilton v. Beazer Materials & Servs.*, 1992 WL 44492 (9th Cir. March 12, 1992). The Ninth Circuit stated in part:

This court has held that enforcement of indemnification clauses does not frustrate public policy as expressed in CERCLA. In *Mardan*, we reasoned that CERCLA policy would not be frustrated because all responsible parties would remain fully liable to the government, although they would be free to enter into private contractual arrangements 'essentially tangential to the enforcement of CERCLA's liability provisions.'

*Id.* at \*1-2 (citing *Mardan*, 804 F.2d at 1459).

166. *Mardan*, 804 F.2d at 1459.

167. *Id.*

168. *Id.* The PRPs that have entered into contractual releases may seek contribution under CERCLA section 113(f). CERCLA § 113(f), 42 U.S.C. 9613(f). For the text of CERCLA section 113(f), see *supra* note 74.

169. *Id.* at 1459. See *Jones-Hamilton v. Kop-Coat, Inc.*, 750 F. Supp. 1022, 1027 (N.D. Cal. 1990) *rev'd on other grounds sum nom.* *Jones-Hamilton v. Beazer Materials & Servs., Inc.*, 1992 WL 44492 (9th Cir. March 12, 1992). The *Jones-Hamilton* court reluctantly followed *Mardan*. *Jones-Hamilton*, 750 F. Supp. at 1026-27.

170. *Mardan*, 804 F.2d at 1459.

sis.<sup>171</sup> In *Purolator Products, Corp. v. Allied-Signal, Inc.*,<sup>172</sup> the present owner of a hazardous waste site brought an action for contribution against the former owner of the site, Allied-Signal.<sup>173</sup> Allied-Signal inherited the site from its "corporate predecessor" who created the waste.<sup>174</sup> The contractual release stated that "any and all liabilities arising out of or connected with the assets and businesses of [Purolator]" are transferred to Allied-Signal.<sup>175</sup> Although the contractual release never referred to "environmental-like"<sup>176</sup> liability, the United States District Court for the Western District of New York held that the release covers CERCLA liability.<sup>177</sup> The court also followed the *Mardan* analysis and determined that the release was valid between the responsible parties, but invalid between the government and the responsible parties.<sup>178</sup>

Similarly, in *Niecko v. Emro Marketing Co.*,<sup>179</sup> plaintiffs sought, *inter alia*, contribution from the former owner of the hazardous waste site which plaintiffs bought.<sup>180</sup> The United States District Court for the Eastern District of Michigan held that the "as is" clause in the contract of sale transferred CERCLA liability to plaintiffs.<sup>181</sup> The court held that the plaintiffs were not liable under CERCLA because the hazardous substances at issue were excluded by the "petroleum exclusion" set forth in CERCLA section 101(14).<sup>182</sup> The court interpreted the Michigan Leaking Underground Storage Tank Act (LUST Act), which has a provision

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171. See *Purolator Products Corp. v. Allied-Signal, Inc.*, 772 F. Supp. 124, 129-30 (W.D.N.Y. 1991); *Niecko v. Emro Mktg. Co.*, 769 F. Supp. 973, 988-89 (E.D. Mich. 1991); *Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448, 1456 (N.D. Ind. 1990).

172. 772 F. Supp. 124 (W.D.N.Y. 1991).

173. *Id.* at 126.

174. *Id.*

175. *Id.* at 128.

176. For a discussion of cases that uphold "environmental-like" liabilities, see *supra* note 161.

177. *Purolator Products*, 772 F. Supp. at 133-34. For a discussion of the interpretation of releases, see *supra* notes 159-161 and accompanying text.

178. *Id.* at 130. See *Niecko*, 769 F. Supp. at 989.

179. 769 F. Supp. 973 (E.D. Mich. 1991).

180. *Id.* at 976.

181. *Id.* at 978. The "as is" clause stated that "seller has not made and makes no warranties or representations as to the condition of said property, including but not limited to, soil conditions, zoning, building code violations. . . . Buyer is purchasing the [property] 'as is'; that he assumes all responsibility for any damages caused by the conditions on the property upon transfer of title." *Id.*

182. 42 U.S.C. § 9601(14). *Niecko*, 769 F. Supp. at 981. Courts interpret section 101(14) as excluding those substances that are inherent in petroleum

very similar to CERCLA section 107(e)(1),<sup>183</sup> using the *Mardan* analysis.<sup>184</sup> The court upheld the release between the parties and granted defendant's motion for summary judgment.<sup>185</sup>

2. *Upholding Contractual Releases Between a PRP and a Party that Would Not Otherwise Be Liable Under CERCLA:*  
*AM International v. International Forging Equipment*

In *AM International v. International Forging Equip.*,<sup>186</sup> the United States District Court for the Northern District of Ohio disagreed with the court in *Mardan*.<sup>187</sup> Using legislative history to support its holding, the court concluded that contractual releases are invalid when entered into between parties who are liable under

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from the definition of "hazardous substances." *Id.* Therefore, sites contaminated with petroleum substances are not regulated by CERCLA.

183. *Niecho*, 769 F. Supp. at 987. The court quoted as follows:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator or from any person who may be liable for a release or threat of release under this [a]ct, to any person the liability imposed under this [a]ct. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this [a]ct.

*Id.* (quoting MICH. COMP. LAWS § 299.842(6) (1979)).

184. *Id.* at 988-89. The court stated:

There is nothing in the first sentence that purports to prevent liable parties under [CERCLA] from apportioning, allocating, or even shifting completely among themselves the liability that each party will owe the CERCLA claimant, so long as each contracting party understands that it will remain jointly and severally liable to that CERCLA claimant. An interpretation to the contrary would effectively burden all contractual exchanges involving property that may fall under CERCLA's purview. This was not Congress' intention. The second sentence of Section 107(e)(1) clarifies and reinforces the scope of the prohibition in the first sentence.

*Id.*

185. *Niecho*, 769 F. Supp. at 992.

186. 743 F. Supp. 525 (N.D. Ohio 1990). AM International (AMI), the plaintiff, had executed a sale and partial leaseback of its property to D&B Realty. *Id.* at 526. In 1982, AMI closed its machine shop and painting facility and entered into an asset purchase contract with Robert T. Dziak, defendant. *Id.* Dziak agreed to buy the assets "as is, where is." *Id.* Two years after the asset purchase contract was entered into, one of Dziak's corporations paid AMI \$2.3 million as part of an accord and satisfaction and AMI released Dziak of all claims. *Id.* The EPA approached AMI concerning hazardous waste on the property and AMI cleaned up the site. *AM Int'l*, 743 F. Supp. at 526.

AMI brought suit against Dziak and his corporation for contribution under CERCLA section 107(e)(1). *Id.* Dziak counterclaimed for indemnification pursuant to the contractual release. *Id.* AMI moved for summary judgement which the court denied. *Id.*

187. *AM Int'l*, 743 F. Supp. at 529.

CERCLA and valid between PRPs and parties who would not otherwise be liable under CERCLA.<sup>188</sup> The court found section 107(e)(1) is "internally inconsistent."<sup>189</sup> To determine the meaning of section 107(e)(1), the court examined a draft provision of the CERCLA bill.<sup>190</sup> The court inferred from the draft that Congress only intended contractual releases to release CERCLA liability in limited situations.<sup>191</sup>

The *AM International* court referred to a discussion between United States Senators Howard W. Cannon (D-Nev.) and Jennings Randolph (D-W.Va.), who sponsored the bill.<sup>192</sup> This colloquy is the only reference to the conflicting sentences of section 107(e)(1) in the legislative history.<sup>193</sup> Based on the Can-

188. *Id.*

189. *AM Int'l*, 743 F. Supp. at 528. For a discussion of the apparent inconsistency in CERCLA section 107(e)(1), see *supra* note 73 and accompanying text.

190. *Id.* The draft the court analyzed stated:

[N]o indemnification, hold harmless, conveyance, or similar agreement shall be effective to transfer from the owner or operator of a facility, or from any person who may be liable for the release under this section, to any other person the liability imposed under this section: Provided, That this subsection shall not apply to a transfer in a bona fide conveyance of a facility or site (1) between two parties not affiliated with each other in any way, (2) where there has been an adequate disclosure in writing . . . of all facts and conditions (including potential economic consequences) material to such liability, and (3) to a transferor who can provide assurances of financial responsibility and continuity of operation consistent with the degree and duration of risks associated with such facility or site.

*Id.* at 528 (quoting S. REP. NO. 1480, 96th Cong., 2d Sess. (1980) (emphasis omitted) [hereinafter S. 1480]).

191. *AM Int'l*, 743 F. Supp. at 529.

192. *Id.* at 528-29. The court quoted as follows:

Mr. CANNON: Section 107(e)(1) prohibits transfer of liability from the owner or operator of a facility to other persons through indemnification, hold harmless, or similar agreements or conveyances. Language is also included indicating that this prohibition on the transfer of liability does not act as a bar to such agreements, in particular to insurance agreements.

The net effect is to make the parties to such an agreement, which would not have been liable under this section, also liable to the degree specified in the agreement. It is my understanding that this section is designed to eliminate situations where the owner or operator of a facility uses its economic power to force the transfer of its liability to other persons, as a cost of doing business, thus escaping liability under the [a]ct all together.

Mr. RANDOLPH: That is correct.

*Id.* at 529 (quoting 126 CONG. REC. 30,984 (1980)).

193. See *Jones-Hamilton v. Kop-Coat, Inc.*, 750 F. Supp. 1022, 1026 (N.D. Cal. 1990) *rev'd on other grounds sum nom.* *Jones-Hamilton v. Beazer Materials & Servs., Inc.*, 1992 WL 44492 (9th Cir. March 12, 1992). See also 126 CONG. REC. 30,984 (1980).

non/Randolph discussion, the court found that the first sentence proscribes contractual releases, except where a contract provides for indemnity or additionally liable parties.<sup>194</sup> The second sentence does not relieve a party of liability, but allows contracts to provide for additional contractual liability.<sup>195</sup>

The court concluded that Congress intended that section 107(e)(1) prohibit all contractual releases when the government is a party and when PRPs sue one another for contribution.<sup>196</sup> The court held that contractual releases would be upheld between a PRP and a party who would not normally be liable under CERCLA when that party agrees to indemnify the PRP or contribute additional liability.<sup>197</sup> The court also referred to CERCLA section 107(e)(2) to support its determination.<sup>198</sup> The court interpreted this provision as permitting causes of action for contribution between PRPs regardless of the contractual release.<sup>199</sup>

Finally, the court supported its conclusion by examining the public policies which motivated the promulgation of CERCLA.<sup>200</sup> The primary policy was the cleanup of hazardous waste, and a secondary policy was to proscribe contractual releases which prevent parties from fulfilling the primary policy.<sup>201</sup> Therefore, proscribing contractual releases, except where the release holds a party liable that would not otherwise be liable under CERCLA, supports the goals of section 107(e)(1).<sup>202</sup> In essence, the *AM International* court allowed the expansion of contractual liability to other parties who are not liable under CERCLA, but proscribed

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194. *AM Int'l*, 743 F. Supp. at 529.

195. *Id.* The second sentence allows for additional liability when parties that would not normally be liable under CERCLA section 107 agree to take on a PRP's environmental liabilities. An example of a party that is not normally liable under CERCLA is an insurance carrier.

196. *AM Int'l*, 743 F. Supp. at 529.

197. *Id.* The court stated:

In sum, Congress intended subsection 107(e)(1) to prevent the parties from contractually relieving themselves of liability under the act, whether that liability is enforced by action of the government or in a suit by a person who performed the clean-up and sues others for contribution under the act. In addition, by the second sentence, Congress intended to permit any person to contract with others not already liable under the act to provide additional liability by way of insurance or indemnity.

*Id.*

198. *Id.* For the text of CERCLA section 107(e)(2), see *supra* text accompanying note 73.

199. *AM Int'l*, 743 F. Supp. at 529.

200. *Id.*

201. *Id.*

202. *Id.*

shifting or limiting contractual liability between responsible parties that are already liable.<sup>203</sup>

#### B. Analysis of the Two Interpretations of CERCLA Section 107(e)(1)

Three types of lawsuits are contemplated by the above decisions: the government versus PRPs; a PRP versus another PRP; and a PRP versus a party not liable under CERCLA, such as an insurance carrier. Neither of these courts would uphold a contractual release where the government is suing a PRP for cleanup costs.<sup>204</sup> It is clear, however, that the *Mardan* court would uphold a contractual release of environmental liabilities between private parties and between PRPs and an insurance carrier.<sup>205</sup> The *AM International* court would uphold contractual releases only in suits involving a PRP and an insurance carrier.<sup>206</sup>

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203. See *Purolator Products Corp. v. Allied-Signal, Inc.*, 772 F. Supp. 124, 129 (W.D.N.Y. 1991). For a discussion of *Purolator Products*, see *supra* notes 172-178 and accompanying text.

At least one other case applies the *AM International* analysis. See *Central Ill. Public Serv. v. Industrial Oil Tank & Line Cleaning Serv.*, 730 F. Supp. 1498, 1507 (W.D. Mo. 1990). However, the court in that case failed to explicitly cite authority for its interpretation of CERCLA section 107(e)(1). The court stated:

The two sentences in Section 9607(e)(1) can be reconciled in only one way: That is, a liable party remains liable (e.g., to the United States) regardless of whether it has an indemnity agreement, but the liable party still may proceed against a third party (e.g., an insurance company) which has agreed to indemnify the liable party. The interpretation is consistent with the statute, the cases applying it, and the legislative history.

*Id.*

204. Several courts assume that contractual releases are invalid when the government is suing a PRP for contribution. See *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986); *American Nat'l Can Co. v. Derr Glass Mfg. Corp.*, 1990 WL 125368 (N.D. Ill. 1990); *Chemical Waste Management v. Armstrong World Indus.*, 669 F. Supp. 1285 (E.D. Pa. 1987); *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285 (D. Minn. 1987).

205. *Mardan*, 804 F.2d at 1459; *Versatile Metals v. Union Corp.*, 693 F. Supp. 1563, 1573 (E.D. Pa. 1988). Although the *Versatile Metals* and *Mardan* courts do not specifically state that they would uphold releases between a PRP and a party not otherwise liable it seems likely that they would uphold such a release given the courts' interpretation that releases are valid between private parties.

206. *AM Int'l*, 743 F. Supp. at 529.

V. MAKING SENSE OF CONTRACTUAL RELEASES AND  
CERCLA LIABILITY

A. Uniform Federal Rules of Decision Should Be Incorporated  
to Provide Content for CERCLA

The *Mobay* court properly held that federal law applied to the interpretation of CERCLA and releases of environmental liabilities.<sup>207</sup> The district court also properly interpreted the *Kimbell Foods* test where there is a contractual release of CERCLA liability.<sup>208</sup> In applying the *Kimbell Foods* test, the *Mobay* court held that uniform federal rules of decision should give CERCLA its content.<sup>209</sup> Congress, the court found, intended that judges would develop a federal common law to fill in the gaps of CERCLA.<sup>210</sup> Evidence of this intent is shown by Representative Florio's statement that federal law is needed to establish a uniform rule.<sup>211</sup> The Congressional Committee's adoption of the legislative history interpretation articulated by the court in *Chem-Dyne*,<sup>212</sup> when coupled with Representative Florio's statement, establishes Congress' intent to create a uniform federal common law to give

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207. *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 351 (D.N.J. 1991). Courts are not in disagreement whether federal law is applicable in interpreting CERCLA liability. For a discussion of the applicability of federal law, see *supra* note 76 and accompanying text.

208. See *supra* notes 99-105 and accompanying text.

209. *Mobay*, 761 F. Supp. at 352. *Accord* *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 809 (S.D. Ohio 1983).

210. *Mobay*, 761 F. Supp. at 351. The court stated the following:

While CERCLA's legislative history strongly suggests a Congressional directive to federal courts to develop uniform federal rules, CERCLA does not contain specific assertion of Congressional intent. 'Although some difference exists between the establishment of CERCLA liability and the release of a CERCLA right of action, a uniform federal rule regarding releases from CERCLA liability serves Congress' goals in the same manner that a uniform rule regarding liability does.'

*Id.* (citing *Mardan*, 804 F.2d at 1464 (Reinhardt, J., dissenting)).

211. For a discussion of Representative Florio's statement, see *supra* notes 125-128 and accompanying text.

212. In *Chem-Dyne*, the court analyzed the scope of liability under CERCLA. *Chem-Dyne*, 572 F. Supp. at 807-08. The court noted that Congress deleted a reference to scope of liability in order to "avoid a statutory legislative standard applicable in situations which might produce inequitable results in some cases. The deletion was not intended as a rejection of joint and several liability." *Id.* at 808 (citation omitted). The court further noted that Congress intended to create a common law which would perform an individual evaluation of each case. *Id.* By extension, it is logical that this analysis is also applicable to releases under section 107(e)(1). Because Congress intended to create a federal common law to define the scope of liability, the scope of liability which applies to parties who have contractually released liability should also be governed by a federal common law. See *supra* note 128 and accompanying text.

CERCLA its content.<sup>213</sup> While neither Representative Florio nor the *Chem-Dyne* court refers to 107(e)(1) specifically, they do refer to CERCLA liability generally.<sup>214</sup> Thus, Representative Florio's statement and the *Chem-Dyne* court suggest that uniform federal rules of decision should be applied in interpreting CERCLA section 107(e) in relation to contractual releases of environmental liabilities.<sup>215</sup>

#### B. Contractual Releases of CERCLA Liability Should Be Upheld Where the Release Includes an Express Release of CERCLA Liability

The policy issues that a court faces in determining whether to uphold a contractual release are two-fold. First, one purpose of CERCLA is to extend liability to all responsible parties.<sup>216</sup> Second, the court, as a matter of strict construction, should construe ambiguous provisions of a release against the drafter.<sup>217</sup>

Both of these policies point to a narrow construction of contractual releases of environmental liabilities. A narrow interpretation of a contractual release would uphold the goal of extending liability to all responsible parties.<sup>218</sup> A narrow interpretation of a release would also uphold the the general rule of construing ambiguous releases against the drafter.<sup>219</sup> If it is unclear that the

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213. While neither Representative Florio nor the *Chem-Dyne* court refers specifically to section 107(e)(1), they both refer to CERCLA liability in general. *Chem-Dyne*, 572 F. Supp. at 808.

214. *Id.*

215. See *Chem-Dyne*, 572 F. Supp. at 807-08. See also *supra* notes 125-128 and accompanying text.

216. *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 350 (D.N.J. 1991). "To achieve CERCLA's remedial goals of protecting public health and the environment, courts are 'obligated to construe its provisions liberally.'" *Id.* (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)). See H.R. 1016, *supra* note 51, at 17. See also *Wiegmann & Rose Int'l v. NL Indus.*, 735 F. Supp. 957, 962 (N.D. Cal. 1990). The *Wiegmann & Rose* court held that "allowing an otherwise 'responsible party' to avoid liability under Section 107, based on an 'as is' clause in the deed conveying the property, would clearly circumvent both the intent and the language of the statute. This is particularly true when the conveyance occurred prior to the enactment of CERCLA and the purchasers had no knowledge of the contamination." *Wiegmann & Rose*, 735 F. Supp. at 962.

217. *Parker & Slavich*, *supra* note 80, at 1352.

218. A narrow interpretation of contractual releases may result in their invalidation, and if the release is rendered invalid then all responsible parties would remain liable for the cleanup costs. See *Wiegmann & Rose*, 735 F. Supp. at 962.

219. *Alcoa Steamship Co. v. United States*, 338 U.S. 421, 424-25 (1949). Generally, it is the drafter that seeks to be relieved of liability. The drafter is



378 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. III: p. 347

release relieves a party of CERCLA liability, the release would be construed as not to include such liability.<sup>220</sup> Therefore, all responsible parties would be liable for the cleanup costs to the government as well as between themselves.<sup>221</sup>

Where the release expressly relieves a responsible party of CERCLA liability, a court should uphold it.<sup>222</sup> Express releases should be upheld for two reasons: (1) the parties' intent was to relieve one responsible party of liability and (2) the provision is not ambiguous and should not be construed against the drafter.<sup>223</sup>

C. Courts Should Interpret Section 107(e)(1) as Validating Contractual Releases Only Between Private Parties

1. *The Mardan Corp. v. C.G.C. Music, Ltd. Analysis*

The Ninth Circuit held that contractual releases are valid between private parties but that they do not relieve a party of the underlying liability to the government.<sup>224</sup> The *Mardan* court considered two competing goals: the first goal is to uphold contracts made between private parties,<sup>225</sup> and the second goal is to hold responsible parties liable to the government for hazardous waste cleanup costs.<sup>226</sup> The *Mardan* analysis allows courts to uphold both.<sup>227</sup>

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usually the seller of the hazardous waste site. Therefore, the courts should construe an ambiguous provision against the seller.

220. See *supra* note 160 discussing courts that require an express release of CERCLA liability in order to uphold the release.

221. For a discussion of liability under CERCLA, see *supra* notes 61-65 and accompanying text.

222. *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1002 (D.N.J. 1988); *Chemical Waste Management v. Armstrong World Indus.*, 669 F. Supp. 1285, 1294 (E.D. Pa. 1987); *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285, 1292 (D. Minn. 1987). Courts have found express releases of CERCLA liability where the language of the release fails to mention CERCLA or environmental liability. For a discussion of the courts that upheld express releases of CERCLA liability, see *supra* note 79.

223. See *supra* notes 77-78 and accompanying text.

224. *Mardan Corp. v. C.G.C. Music, Ltd.*, 808 F.2d 1454, 1459 (9th Cir. 1986).

225. Michael O. Ellis, *Private Indemnity Agreements Under Section 107 of CERCLA*, [Current Developments] Env't Rep. (BNA), 1953, at 1957, (December 6, 1991) [hereinafter *Private Indemnity Agreements*]. "The U.S. Supreme Court has often declared this principle to be one of the highest order, and the protection of this principle to be one of the highest duties of the courts." *Id.*

226. *Id.*

227. For a discussion of the *Mardan* analysis, see *supra* notes 165-170 and accompanying text. See also *Private Indemnity Agreements*, *supra* note 225, at 1957. "There is nothing in this arrangement that frustrates the goals of CERCLA, nor

The Ninth Circuit may flesh out its holding by stating that the first sentence of 107(e)(1) prohibits *transferring* CERCLA liability while the second sentence permits the *distribution* of CERCLA liability among PRPs.<sup>228</sup> CERCLA's legislative history confirms this distinction.<sup>229</sup>

The *Mardan* analysis also furthers two other CERCLA goals. First, CERCLA stresses voluntary cleanup of hazardous waste sites by PRPs.<sup>230</sup> Under *Mardan*, PRPs are more likely to clean up hazardous waste sites voluntarily because they know that their contractual release will be upheld when they seek contribution from other PRPs.<sup>231</sup> Another CERCLA goal is to induce PRPs to settle CERCLA claims among themselves.<sup>232</sup> The *Mardan* analysis furthers this goal by upholding contractual releases between PRPs in exchange for a release from responsibility for future costs.<sup>233</sup>

## 2. *The AM International v. International Forging Corp. Analysis*

While the *Mardan* analysis is based on public policy, the *AM International* analysis is based on legislative history. However, the *AM International* court improperly applied CERCLA legislative history in upholding contractual releases of environmental liabilities only when a PRP seeks relief from liability from its insurance carrier for two reasons.<sup>234</sup> First, the court should not have relied so heavily on the colloquy between Senators Cannon and Randolph because the rules of statutory construction mandate that statements made by senators during floor debate not be given significant weight.<sup>235</sup> Legislative history is unreliable, especially in

does it impinge on the broader policy of protecting the liberty to contract. Indeed, in this situation the released party would be more willing to perform the cleanup since it could be confident its contract with the releasing party would be enforced by the courts." *Private Indemnity Agreements*, *supra* note 225, at 1957.

228. See *Private Indemnity Agreements*, *supra* note 225, at 1956.

229. *Id.* For a discussion of CERCLA legislative history see *infra* notes 241-248 and accompanying text.

230. See *supra* notes 54-60 and accompanying text.

231. *Private Indemnity Agreements*, *supra* note 225, at 1957.

232. *Id.*

233. *Id.*

234. *Private Indemnity Agreements*, *supra* note 225, at 1955.

235. For a discussion of the Senator Randolph and Senator Cannon colloquy, see *supra* notes 192-195 and accompanying text. *Private Indemnity Agreements*, *supra* note 225, at 1955 (citing *Blitz v. Donovan*, 740 F.2d 1241, 1247 (D.C. Cir. 1984) Singer, SUTHERLAND STATUTORY CONSTRUCTION, § 48.13 (4th ed. 1986)).

Additionally, these statements should not be entitled to substantial weight because "in the course of oral argument on the Senate floor, the choice of

relation to CERCLA, because it was " 'hastily and inadequately drafted.' " <sup>236</sup> Additionally, the procedural rules in voting for CERCLA prohibited any amendments to the Act. <sup>237</sup> Therefore, there was no floor debate which would have created more substantial legislative history. <sup>238</sup> Also, the compromise committee, due to time constraints, failed to analyze the CERCLA bill carefully. <sup>239</sup> Indeed, the compromise committee failed to make a report. <sup>240</sup> Thus, the *AM International* court's reliance on the meager legislative history was inappropriate.

Second, the court failed to analyze the legislative history completely. <sup>241</sup> The *AM International* court analyzed a pre-compromise bill, Senate Bill 1480. <sup>242</sup> The court failed to take the legislative history of this bill into account. <sup>243</sup> The legislative history of the pre-compromise bill contradicts the *AM International* court's holding. <sup>244</sup> Indeed, each pre-compromise bill distinguished between transferring and distributing liability. <sup>245</sup> In addition, the Superfund Amendments and Reauthorization Act of 1986, in par-

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words by a Senator is not always accurate or exact.' " *Private Indemnity Agreements*, *supra* note 225, at 1955 (quoting *In re Carlson*, 292 F. Supp. 778, 783 (C.D. Cal. 1968)).

236. *Private Indemnity Agreements*, *supra* note 225, at 1954 (quoting *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1253 (S.D. Ill. 1984)).

237. *Private Indemnity Agreements*, *supra* note 225, at 1954.

238. *Id.* at 1955.

239. *Id.* at 1954. The article quotes the *Artesian Water* court as follows:

After a number of predecessor bills failed to muster sufficient support, a group of senators submitted the Stafford-Randolph compromise bill to the lame duck Congress in the waning days of the Carter Administration. That bill, however, did not receive careful study by the committee, and voting on the floor was controlled by a procedure that permitted no amendments, other than one previously cleared. The legislative history, therefore, furnishes at best a sparse and unreliable guide to the statute's meaning.

*Id.* (quoting *Artesian Water Co. v. New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988)).

240. *Private Indemnity Agreements*, *supra* note 225, at 1954.

241. *Id.*

242. For the text of S. 1480, see *supra* note 189.

243. *Private Indemnity Agreements*, *supra* note 225, at 1955.

244. *Id.* at 1956.

245. *Id.*

Every one of the pre-compromise bills made this key distinction. Each bill, while prohibiting the transfer of the statutory strict liability, permitted private agreements which distribute some or all of the costs. Far from rendering indemnity and hold-harmless agreements unenforceable, the legislative history of CERCLA shows a concern for *preserving* such agreements.

*Id.* (emphasis in original).

ticular section 113(f),<sup>246</sup> affirms this distinction.<sup>247</sup> That section allows PRPs to seek contribution from “any other liable [party].”<sup>248</sup> Section 113(f) permits parties to distribute liability just as section 107(e)(1) permits parties to distribute rather than to transfer liability.

Under the *AM International* analysis, it is likely that insurance companies will refuse to cover hazardous waste sites because they may bear the full burden of cleanup costs.<sup>249</sup> In the alternative, the insurance companies may raise premiums drastically to cover their potential liability under CERCLA.<sup>250</sup> In doing so, the ultimate burden may rest once again on the responsible parties. In effect, the *AM International* analysis renders CERCLA section 107(e)(1) practically meaningless because PRPs will not be able to get insurance coverage at all or will be faced with strict limitations on their insurance coverage. As a result, PRPs may have to bear the burden of cleanup costs regardless of the contractual release.

## VI. CONCLUSION

Congress intended to make all responsible parties strictly liable under CERCLA.<sup>251</sup> Congress also intended that CERCLA liability provisions be interpreted broadly.<sup>252</sup> In doing so, Congress set up narrow defenses to CERCLA liability.<sup>253</sup> Because these defenses are narrow and liability is broad, PRPs have attempted to distribute liability through contractual releases.<sup>254</sup> In dealing with such contractual releases, courts should apply uniform federal rules of decision to the interpretation of CERCLA because

246. For a discussion of the Superfund Amendments and Reauthorization Act section 113(f), see *supra* note 74.

247. *Private Indemnity Agreements*, *supra* note 225, at 1956. The United States Supreme Court noted that the view of subsequent Congresses cannot preempt the view of the Congress that enacted CERCLA, however, the view of subsequent Congresses can be afforded “significant weight and particularly so when the precise intent of the enacting Congress is obscure.” *Id.* (quoting *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980)).

248. CERCLA § 113(f), 42 U.S.C. § 9613(f).

249. *Toxic Waste Litigation*, *supra* note 3, at 1575.

250. *Id.* at 1576.

251. CERCLA 107(a), 42 U.S.C. § 6907(a).

252. *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 350 (D.N.J. 1991); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985). See *supra* note 50.

253. CERCLA § 107(b), 42 U.S.C. § 6907(b). For a discussion of the defenses to CERCLA liability, see *supra* notes 66-71 and accompanying text.

254. For a discussion of bankruptcy, insurance and contractual releases as defenses to CERCLA liability, see *supra* notes 85-90 and accompanying text.

382 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. III: p. 347

Congress adopted the view that federal rules of decision should apply to CERCLA liability.<sup>255</sup> To uphold the CERCLA objective of holding all PRPs liable courts should validate express releases of environmental liabilities.<sup>256</sup> Finally, to uphold CERCLA's goals and validate contracts between private parties courts should interpret CERCLA section 107(e)(1) as valid between PRPs and invalid between PRPs and the government.<sup>257</sup>

Amy E. Aydelott

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255. *See supra* notes 207-215 and accompanying text.

256. *See supra* notes 216-223 and accompanying text.

257. *See supra* notes 224-250 and accompanying text.